No. 13,884

IN THE

United States Court of Appeals

For the Ninth Circuit

VAUGHN H. MITCHELL and
DOROTHY MITCHELL,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

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Appellants, husband and wife, were convicted on five counts relating to income tax evasion for the year 1947, whereby in round figures $26,000 of taxable income was concealed and $18,000 of tax was evaded. The first four counts charged income tax evasion against husband and wife for their own and their spouse's returns. The fifth count charged a conspiracy among husband and wife and Dr. Mitchell's office bookkeeper, Iris M. Cowart, a coconspirator but not a defendant, to evade the Mitchells' income taxes for the year 1947. The trial lasted one month. The printed record (without exhibits) is over 2000 pages.

I.

STATEMENT OF FACTS.

A. Standard to be used.

On appeal this Court must consider the evidence in the light most favorable to the government. *Schino and Hartmann v. United States,* ..... F. (2d) ..... (9th Cir. #13,375, 1953); *Glasser v. United States,* 315 U. S. 60, 80.

The record discloses a fully-perfected, elaborate scheme of tax fraud for the year 1947 deliberately undertaken by the Mitchells.

B. The tax evasion scheme.

The scheme involved the secreting of currency from the cash receipts of Dr. Mitchell's medical practice during the year 1947. This was accomplished by the use of two sets of cash receipt books in Dr. Mitchell's office and the switching of the cash receipt books daily (271, 419-420). The currency recorded in the open set of cash receipt books (ex. 11, ex. 12, ex. 53) was deposited in the bank in accordance with Dr. Mitchell's standard practice prior to 1947 (257-258, 272) and reported on the income tax returns (ex. 1, ex. 2, ex. 10, 125-131). The currency recorded in the hidden set of cash receipt books was kept in sealed envelopes in the office safe and secretly removed from the office from time to time by Mrs. Mitchell (272). Mrs. Cowart handled the daily switching of the cash receipt books (421), segregated the currency and the cash, and balanced each set of books daily (271), deposited the cur-

rency from the open set of cash receipt books in the bank (272), and delivered the other currency to Mrs. Mitchell (272).

The use of two sets of cash receipt books and the daily switching of the books was kept secret from all other employees in the office (423). None of them was told about the two sets of books except one employee, Mrs. Jean Peirson, who discovered it by accident (418, 284) and was then advised not to tell any other employee (423).

Sometime in January, 1948, the hidden set of cash receipt books was removed from the doctor's office and delivered to the Mitchells' apartment by Mrs. Cowart (279-281). This set of books was subsequently burned by Mrs. Mitchell in February, 1949, when she first heard of her husband's indictment for income tax evasion during the years 1942 to 1946 (1472, 523).

In August, 1949, the government discovered the use of the hidden set of cash receipt books during 1947 (131, 524). Internal Revenue agents then undertook to reconstruct Dr. Mitchell's true professional income (524); after approximately four months' work they prepared a tabulation of some 2,000 separate payments from some 1,000 different patients, totaling in excess of $26,000 of cash income which had been concealed by the Mitchells (534-538). This tabulation of 44 pages appears in evidence as Exhibit 28. Throughout the trial not a single item in it was shown to be erroneous.

Appellants admitted the use of two sets of cash receipt books (1518, 1464), admitted the daily switching of books (1464), admitted the secrecy of the operation (1467), admitted the removal of currency in sealed envelopes from the office (1468, 1479), admitted the failure to deposit it in the bank (1507, 1522, 1523), admitted the removal of the hidden set of cash receipt books from the office (1523, 1472), admitted the failure to report income shown in these cash receipt books on their tax returns (ex. 32), and admitted the burning of the cash receipt books by Mrs. Mitchell (1529-1530, 1472).

The defense of Dr. Mitchell was that he knew nothing about the scheme, that it was one devised by his wife to obtain money from him without his knowledge in view of pending matrimonial troubles (1604-1607, 1633-1635).

Mrs. Mitchell admitted knowing all about the scheme, but her defense was that the tax evasion motive played no part in her conduct (1465, 1505) and, in any event, she thought this money would be reported on the income tax returns (1515-1516).

At the trial the testimony of Mrs. Cowart established Dr. Mitchell's participation in every important phase of the scheme—its initiation (266-270), suspension during Mrs. Cowart's vacation (820-821), termination at the end of the year (278-279), and delivery of the hidden set of cash receipt books to Mrs. Mitchell (280, 847).

The testimony of the office receptionist, Mrs. Peirson, provided direct proof that the scheme had been devised to evade income taxes. She had been told by Mrs. Cowart in 1947 that the scheme was Dr. Mitchell's idea (420), that the purpose of the scheme was to keep money out of the bank so that Internal Revenue agents could not trace it for income tax purposes (419-420, 460), that Dr. Mitchell had devised this scheme in order to outsmart the Government (420, 460), that Dr. Mitchell wanted to put so much money in the bank and withhold so much for himself (420, 467-468).

At the trial the defense undertook to show that Dr. Mitchell had filed amended returns for 1942 to 1946, had overpaid his taxes for those years (see ex. B), and that accordingly he had on deposit with the Bureau of Internal Revenue more than sufficient moneys to pay his admitted 1947 income tax deficiencies (249-252, 314, 1309). The evidence showed that in years prior to 1947, that is to say 1938 to 1946, Dr. Mitchell either filed no tax return or reported only a small fraction of his true income (262-264, 386-390), but that in these prior years he did not keep two sets of cash receipt books nor did he undertake to conceal his gross receipts by failing to deposit them in his various bank accounts (257-258). In July, 1949, Dr. Mitchell had been tried and acquitted for income tax evasion for the years 1942 to 1946 (147).

Dr. Mitchell's tax practices first came to light on November 5, 1946, when Internal Revenue Agent

Green in the course of a routine audit examined Dr. Mitchell's records and discovered a large deficiency in reported income for the years 1942 to 1945 (259-260). Agent Green talked to Dr. Mitchell that same day and informed him that by totalling his bank deposits he had been able to discover this large amount of unreported income (261). Agent Green additionally told Dr. Mitchell that if all his receipts were deposited in the bank and all his expenses paid by check, his true income could be readily calculated (261-262). Within 30 to 60 days of this conversation the present scheme, designed to prevent part of the currency receipts from ever passing through the bank accounts, was put into operation and continued throughout 1947 (ex. 6, 124).

The evidence, construed most favorably to the verdict of the jury—as is required in this review—clearly discloses that the 1947 scheme was put into operation for the specific purpose of outsmarting the Government and forestalling future analyses similar to that made by Agent Green during 1946 (420, 817-818).

At the end of 1947 appellants employed a certified public accountant, Joseph Lukes, to prepare their income tax returns for 1947 (1062). Mr. Lukes was not told about the two sets of cash receipt books (1171), was not told about the daily switching of cash receipt books, and was not told about the secret removal of currency from the office (1249). On the contrary Mr. Lukes was told that all currency was deposited in the

bank (1245). Accordingly, Mr. Lukes did not discover the fraud (1249) and prepared income tax returns for the Mitchells which failed to report any of the currency which had been secretly removed from the office (1251).

While the fact of secret removal of currency from the office was admitted by appellants, the amount was disputed. The Mitchells claimed it was $8,770, and produced that amount of currency in court (ex. 32). Mrs. Cowart said it was $15,000 (274). Appellants' expert accountant, Otto Sonnenberg, of Forbes and Company, gave his first reconstruction of unreported income at $26,000 (1369, 1356) and his later best estimate at $18,000 (1435). The reconstruction prepared by government agents of specific items of unreported income by date, name of patient, and amount of payment showed a total of $26,242.75 and remained uncontroverted (ex. 28). Each of these figures is, of course, a substantial amount.

C. Issues in this cause.

A reading of the record indicates that the cause was primarily one of credibility of witnesses. The jury chose to believe Mrs. Cowart and Mrs. Peirson and to disbelieve appellants. Evidence of guilt was strong. In view of the proof of a deliberate, calculated scheme of tax evasion, the sufficiency of the evidence in support of the verdict is not attacked. Instead appellants seek reversal on the instructions given and on various evidentiary and procedural grounds.

II.

THE COURT PROPERLY INSTRUCTED THE JURY AS TO THE ISSUES IN THE CAUSE.

A. Duty to consider instructions as a whole.

In considering instructions given a jury, this court must examine the instructions primarily to see if the jury properly understood the issues before it. Phrases in a charge cannot be picked out like raisins from a cake and examined by themselves apart from the remainder of the charge and apart from the real issues before the jury. The instructions must be read as a whole and in the light of the case as a whole. *Boyd v. United States,* 271 U.S. 104.

Was there or was there not a tax evasion scheme to defraud the government? That was the great issue here. The instructions clearly and comprehensively pointed this out to the jury.

B. A reading of the instructions leaves no doubt that appellants were on trial for criminal acts and not for negligence.

The instructions given were standard instructions similar to those approved by this Court on several occasions, *Remmer v. United States,* 205 F. (2d) 277, 290; *Barcott v. United States,* 169 F. (2d) 929, 932. Nevertheless appellants contend that the jury was left with the impression that appellants, merely if negligent in handling their financial affairs, could be found guilty of the crime of tax evasion. Appellants argue the impact of the instructions was to advise the jury that these appellants could be convicted of tax evasion by reason of negligence alone.

This issue can only be resolved by reading the instructions. Such a reading shows that again and again the court charged the jury that the issue before it was whether or not there had been a wilful attempt to evade taxes. The government was required to prove that appellants *"wilfully attempted to evade and defeat"* their taxes (1939). Attempt contemplates *"knowledge* and *understanding"* (1940), *"purposely* failing to report all the income which they *knew* they had", "which they *knew* it was their duty" to report (1940). The court referred to *"schemes", "subterfuges", "devices",* and *"wilful attempts"* to escape the tax (1940). "The attempt must be *wilful"* (1941), that is to say *"consciously", "knowingly", "intentionally", "intentionally* done", "with the *intent* that the government should be *defrauded"* (1941). The result must be that the government was *"cheated"* or *"defrauded"* (1941). The court referred to intent as a state of mind (1941) and used the following language: *"intended to conceal"* (1942), "not acting in good faith" (1942), *"purpose of evading* his tax liabilities" (1942), "the *criminal state of mind"* (1942), *"tax evasion motive"* (1942), *"intent to defraud"* (1943). The court referred to *"knowledge* of the falsity of these returns" (1945), "responsibility of at least *good faith* and ordinary diligence" (1945), filing of a fraudulent return with wilful intent to defeat the tax (1946), *"criminal intent"* (1951), "a partnership in *criminal purposes"* (1949), *"intentional participation"* (1952).

The court quoted practically verbatim from the leading case of *Spies v. United States,* 317 U.S. 492, 499. This instruction was as follows:

> "On the question of intent to evade, and, just by way of illustration and not by way of limitation, there are certain matters which you should consider pointing to intent so far as tax evasion is concerned, if you find that they existed in this case. These are general illustrations: *keeping a double set of books, making false entries in the books,* altering invoices or *destruction of books,* destruction of records, *concealment* of assets, *covering up* sources of income, handling one's affairs to *avoid* the making of the usual returns, and *any conduct the likelihood of which would be to mislead or to conceal.* And if the *tax evasion motive* plays any part in such conduct, the offense may be made out, though the conduct I have mentioned might also serve some other purpose." (1942-1943).

The Supreme Court in the *Spies* case had said:

> ". . . By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out even

> though the conduct may also serve other purposes such as concealment of other crime." (499).

Over and over again the court charged the jury on the main question before it—was there a fraudulent tax scheme here? This was the great issue of fact for the jury to determine—both in the tax evasion counts and in the conspiracy count.

The government offered proof of the existence of a deliberate tax evasion scheme in which four of the five badges of fraud set forth by the Supreme Court in the *Spies* case were present, that is to say the keeping of two sets of books, the destruction of records, concealment of assets, and the handling of affairs to avoid making the usual record of bank deposits.

Appellants presented a sweeping defense that Dr. Mitchell knew nothing whatever about the scheme and that Mrs. Mitchell had no thought of tax evasion in mind.

Accordingly, the primary issue before the jury was clear cut. Had there been a deliberate tax evasion scheme and conspiracy as charged? If so, appellants were guilty. If not, they were innocent. This was no case of carelessness, failure to keep records, misinterpretation of the law, mistaken though honest beliefs as to non-taxability of income, underreporting due to ignorance of tax matters, or the like.

The defense of Dr. Mitchell denied all knowledge of the pertinent facts. The testimony of important witnesses identified him with each important phase of the tax evasion scheme. The issue was thus squarely

presented. If he were ignorant of what had happened in his office, then, of course, he had no connection with a tax fraud scheme. If, however, he had devised and initiated the secret removal and concealment of currency from his office in order to outsmart the government and to forestall government methods of reconstructing income recently brought to his attention, then he was guilty. No middle ground of negligence or of misunderstanding of law or misapplication of law was present. The instructions of the court made it perfectly clear that the jury must find the requisite criminal intent, or the criminal state of mind, as the court said (1942).

The same applies to Mrs. Mitchell. Either the jury believed her story that she was acting in good faith with no thought of tax evasion in mind but solely motivated by reason of matrimonial difficulties, past, present and prospective, or it rejected her story and found her an active partner in a tax evasion enterprise. The facts relating to Mrs. Mitchell were essentially not in dispute. Significant on the aspect of intent is the fact that Mrs. Mitchell burned the hidden set of cash receipt books on first hearing of Dr. Mitchell's indictment for income tax evasion in other years.

The court's instructions made it plain that tax evasion required specific criminal intent, wilfulness, a criminal state of mind, failure to act in good faith, intent to conceal, purposefulness, wilful attempts to evade. The issue of appellants' guilt or innocence was made clear to the jury. The jury chose to be-

lieve Mrs. Cowart and Mrs. Peirson as to the intent with which these various acts were done and to disbelieve Dr. Mitchell and Mrs. Mitchell. The jury returned its verdict accordingly.

In a tax evasion case the standard of wilful attempt has been laid down with precision in *Spies v. United States,* 317 U.S. 492, 499. This court, in *Barcott v. United States,* 169 F. (2d) 929, 932, and in *Remmer v. United States,* 205 F. (2d) 277, 290, has approved instructions substantially similar to those in the present case. See also *Sullivan v. United States,* 75 F. (2d) 622, 623.

The specific phraseology objected to in the instructions was taken from *United States v. Banks* (U.S. D.C. Minn. 1952), #72,355 P-H Fed. 1953. The instructions there given were sustained on appeal by the 8th Circuit, 204 F. (2d) 666, 672, and certiorari was denied by the Supreme Court, 74 S. Ct. 73, 98 Law Ed. Adv. 58.

C. The court properly charged the jury that taxpayers are required to keep books and records sufficient to establish their income.

Appellants except to the following instruction:

> "Every person under the laws of the United States, except wage earners and farmers, liable to pay income tax, is required to keep such permanent books of account and records as are sufficient to establish the amount of his gross income, and the deductions, credits and other matters required to be shown in any income tax return." (1952).

It is claimed that this instruction, although given in the language of the statute and the Bureau's regulations (I.R.C. 54 (a), Regulations 111, Sec. 29.54-1), might suggest to the jury that appellants were on trial for failure to keep suitable books and records, rather than for evading income taxes through the device of a fraudulent scheme.

The instruction given was relevant, because the keeping or not keeping of suitable records was of direct concern to the jury on the question of wilful attempt to evade. Admittedly records had been destroyed. Failure to keep the usual records may be a basis of an inference of affirmative wilful attempt to evade. *Spies v. United States,* 317 U.S. 492, 499; *Remmer v. United States,* 205 F. (2d) 277, 288 (failure to keep adequate books may be a basis for an inference of wilful intent to evade); *Himmelfarb v. United States,* 175 F. (2d) 924, 943, 947.

Accordingly, the instruction was proper.

D. Attack on instructions not excepted to at the time of the charge.

Appellants attack portions of the instructions not objected to at the time of the charge, and likewise claim omissions from the charge, also not brought to the attention of the court at the time of charging.

Rule 30 of Criminal Procedure reads in part:

> ". . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict . . ."

Instructions excepted to or proposed for the first time on a motion for a new trial need not be considered by this court. *Ziegler v. United States,* 174 F. (2d) 439, 448; *Boyd v. United States,* 271 U.S. 104, 108.

1. Duty to file an income tax return is personal.

An instruction now sought to be attacked reads as follows:

> "The duty to file an income tax return is personal. It cannot be delegated to anyone. Bona fide mistakes should not be treated as false and fraudulent, of course. [2133] But no man who is able to read and to write and who signs a tax return is able to escape the responsibility of at least good faith and ordinary diligence as to the correctness of the statement which he signs, whether prepared by him or prepared by somebody else." (1945).

It is claimed that this instruction suggested a rule of criminal guilt by respondeat superior. Sufficient answer is found in the instruction given by the court that guilt is personal:

> "You are instructed that in a criminal case, such as this, a principal or employer is not criminally liable merely because his agent or employee may have engaged in conduct which the law denounces. In order to render a person criminally liable, it is essential that he had the requisite criminal intent at the time the supposed criminal act was [2139] committed. In other words, specific intent cannot be imputed to a principal or employer

through his agent or employee, without proof of the principal's or employer's direct participation in, or authorization of, the criminal act." (1950-1951).

2. The result of any previous trial not to be considered by the jury at this trial.

Another instruction now excepted to by appellants reads:

> "You are instructed that the guilt or innocence of Dr. Vaughn H. Mitchell on charges of tax evasion for the years 1942 to 1946, inclusive, is not to be considered by you in determining his guilt or innocence on the charges which are now before you, nor are you to consider for any purpose whatsoever the result of any previous trial." (1938-1939).

Since no objection was made at the proper time, under Rule 30 this portion of the charge is likewise not a ground for error, nor is failure to give some other charge which appellants might now advance.

It is now suggested that through this instruction Dr. Mitchell was being retried for the years 1942 to 1946, and extensive reference is made to the closing arguments in the case (likewise not excepted to by appellants at the time of trial). We have here an afterthought similar to that of the Monday morning quarterback mentioned by this court in *Schino & Hartmann v. United States,* ..... F. (2d) ..... (9th Cir. #13,375, 1953). A reading of the record discloses that the jury could have had no doubt whatever as to the fact of Dr. Mitchell's previous acquittal.

Note that the court told the jury to disregard any previous trial in reaching a verdict on the charges now before it. It was thoroughly proper for the court to do so. Test the instruction by putting the shoe on the other foot. Suppose a previous conviction. The instruction is equally valid—this jury was not concerned with the subject.

The *results* of previous trials must be contrasted with *facts* and conduct in previous years. Previous facts can never be disregarded, if relevant. The fact of previous tax understatement, if relevant to any issue in this case, is admissible evidence, as will be more fully discussed later in this brief.

III.

NEWSPAPER READING AND SLIGHT OPINIONS THEREFROM DO NOT DISQUALIFY A JUROR.

Appellants seek reversal of the verdict because of refusal of the court to sustain a challenge for cause directed to juror Hershler.

Mr. Hershler was a corporation executive; he did not know the parties; he had no prejudices; he had read newspaper reports of the case and may have formed some slight opinion from reading; he would listen to the evidence and the instructions of the court and make up his mind when all the evidence was in; he would be willing to be tried by a jury in his frame of mind, but would prefer trial by the court. No challenge for cause was made against him until the

defense discovered it had exhausted its peremptory challenges.

A subsequent challenge for cause was denied by the court. However, the court instructed the jury to disregard any newspaper reports or prior impressions and to try the case wholly upon the evidence received in the courtroom (63-64). And in final instructions the court instructed the jury several times to reach a verdict solely on the evidence admitted in court (1934-1935, 1948, 1956, 1959). The examination of Mr. Hershler, the court's ruling, and the court's admonition to the jury are reprinted herein as an Appendix.

We have this situation. A highly intelligent juror had read newspaper accounts connected with the case; had formed some slight opinion as to the result of them; was fully capable of listening to the evidence and following instructions of the court; would be willing to have his case tried by a jury in his frame of mind, but would prefer trial by the court.

Does this disqualify him on the ground of bias?

Appellants argue they are entitled to a jury free from any impressions whatsoever and that it was prejudicial error to refuse the challenge.

Such a contention is at variance with the law of the past 150 years. The law does not disqualify jurors who have impressions or opinions about a case. Disqualification only results when those opinions are fixed or are of such strength as to render difficult

the weighing of evidence produced in court, or following in good faith instructions of the court.

A moment's reflection will indicate why this is so. In our society criminal matters of more than routine interest are highly publicized in the press, which is read daily by the populace from which jurors are selected. Practically every prospective juror in a case of any consequence has read about the case to a greater or less extent. The purpose of reading is to educate and inform, and each juror who has read anything necessarily has formed some opinion, no matter how slight, as to matters about which he has read. The same, of course, is true of the judges of the trial courts and the reviewing courts. The results of such reading must produce some reaction—which can be called an impression, opinion, hypothesis, feeling. It is generalized second-hand knowledge of the facts of the case.

Every honest literate juror in cases of general public interest is bound to acquire these impressions or opinions. These do not disqualify. To so hold would be to remove the most intelligent and enlightened citizens from jury service in all publicized cases. It is only fixed opinions which disqualify.

These principles have been well understood from the earliest days of the Republic. *United States v. Burr,* Fed. Cas. 14692 (g). *Reynolds v. United States,* 98 U.S. 145. In the *Reynolds* case, members of the jury panel had read newspaper reports of the trial, had formed some opinions not based on evidence, but said

that such opinions would not influence their verdict. The court held them to be competent jurors:

> "All of the challenges by the accused were for principal cause. It is good ground for such a challenge that a juror has formed an opinion as to the issue to be tried. The courts are not agreed as to the knowledge upon which the opinion must rest in order to render the juror incompetent, or whether the opinion must be accompanied by malice or ill-will; but all unite in holding that it must be founded on some evidence, and be more than a mere impression. Some say it must be positive (Gabbet, Criminal Law, 391); others, that it must be decided and substantial (Armistead's Case, 11 Leigh (Va.), 659; Wormley's Case, 10 Gratt. (Va.) 658; Neely v. The People, 13 Ill. 685); others, fixed (State v. Benton, 2 Dev. & B. (N.C.) L. 196); and, still others, deliberate and settled (Staup v. Commonwealth, 74 Pa. St. 458; Curley v. Commonwealth, 84 id. 151). All concede, however, that, if hypothetical only, the partiality is not so manifest as to necessarily set the juror aside. Mr. Chief Justice Marshall, in Burr's Trial (1 Burr's Trial, 416), states the rule to be that 'light impressions, which may fairly be presumed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of the testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him.' The theory of the

law is that a juror who has formed an opinion cannot be impartial. Every opinion which he may entertain need not necessarily have that effect. In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits. It is clear, therefore, that upon the trial of the issue of fact raised by a challenge for such cause the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest. No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for new trial because the verdict is against the evidence. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the 'conscience or discretion' of the court." (155, 156)

Note the language of a disqualifying opinion: positive, decided, substantial, fixed, deliberate, settled, strong or deep impressions which close the mind against opposite testimony. The Supreme Court further noted that in matters of jury qualifications the trial court should not be reversed except in a clear case, because the trial court has the opportunity to observe the reaction of the juror and his honesty in articulating his sentiments.

The Supreme Court has consistently followed the ruling of the *Reynolds* case. *Hopt v. Utah,* 120 U.S. 430, 432, 434; *Thiede v. Utah Territory,* 159 U.S. 510, 516; *Spies v. Illinois,* 123 U.S. 131, 167-180; *Holt v. United States,* 218 U.S. 245, 248. In the *Holt* case the court held that impressions derived from newspaper reading do not disqualify a juror from serving, Mr. Justice Holmes stating:

> "Next it is said that there was error in not sustaining a challenge for cause to a juryman; with the result that the prisoner's peremptory challenges were diminished by one. On his examination it appeared that this juryman had not talked with anyone who purported to know about the case of his own knowledge, but that he had taken the newspaper statements for facts; that he had no opinion other than that derived from the papers, and that evidence would change it very easily, although it would take some evidence to remove it. He stated that if the evidence failed to prove the facts alleged in the newspapers he would decide according to the evidence or lack of evidence at the trial, and that he thought he could

> try the case solely upon the evidence fairly and impartially. The finding of the trial court upon the strength of the juryman's opinions and his partiality or impartiality ought not to be set aside by a reviewing court unless the error is manifest, which it is far from being in this case. See Reynolds v. United States, 98 U.S. 145. Hopt v. Utah, 120 U.S. 430. Spies v. Illinois, 123 U.S. 131 . . ."

See also *United States v. Dennis*, 183 F. (2d) 201, 228; affirmed 341 U.S. 494.

The rule then is that opinions founded on rumors or newspaper reports do not disqualify a juror if it appears to the court that the juror can, notwithstanding such an opinion, act impartially. This rule has been applied many times in this Circuit. *Green v. United States,* 19 F. (2d) 850, 855; affirmed 277 U.S. 438; *Dimmick v. United States,* 121 Fed. 638, 642; *Dolan v. United States,* 116 Fed. 578, 582; *Merritt v. United States,* 264 Fed. 870, 876. See also *California Penal Code* §1076. To be contrasted are cases where jurors have personal knowledge of the facts or have acquired fixed opinions and expressed doubt as to whether or not they could lay their opinions to one side. *Rosencranz v. United States,* 155 Fed. 38, 46.

The facts of this case as they relate to juror Hershler show an intelligent man of affairs honestly informing the court that he reads the papers; that he has formed some opinion as the result of such reading; that the opinion would not prevent him from passing

on the evidence and following the instructions of the court. Such a juror is fully qualified. If a defendant prefers other jurors he has his peremptory challenges, which by reason of the greater number given him gives him greater control than the government over the composition of the jury.

The test is not one of deriving opinions and impressions. It is one of fixed opinions which will resist change. None such were present in this case.

IV.

MRS. COWART WAS FULLY EXAMINED BY THE DEFENSE. THE COURT PROPERLY LIMITED THE USE OF LEADING QUESTIONS ADDRESSED TO THIS WITNESS.

Complaint is made that appellants were not permitted to cross-examine Mrs. Iris Cowart.

The record discloses that Mrs. Cowart was cross-examined by the defense at length for the better part of two days (287-298, 746-814, 823-868). A reading of her testimony indicates she was questioned exhaustively by the defense on all material and relevant matters.

What the court did was to limit appellants' use of leading questions addressed to this witness.

We are thus dealing solely with a matter of form.

Leading questions are, of course, questions put by the examiner which suggest the desired answers to the witness. The danger of their use is that words are

put into the mouth of the witness, and the testimony becomes that of the interrogator rather than that of the witness. Under such circumstances distortion may result. Fundamentally, the law is a search for the truth, and all legal principles flow from this source. Accordingly, whenever leading questions to a friendly witness are likely to distort the testimonial picture of the true facts, a court may limit or forbid their use. While leading questions are normally objectionable on direct examination and normally permissible on cross-examination, this rule is a rule of trial procedure and subject to change in the light of a witness's relationship and attitude to the cause and the parties.

No rigid rules can be formulated. As stated by Professor Wigmore, the matter must rest largely in the hands of the trial court. *Wigmore on Evidence,* §770. Whenever a witness is shown to be biased in favor of the cross-examiner, the court may exercise its discretion in refusing to permit leading questions to be put to this friendly witness. *Wigmore on Evidence,* §773, §915: ". . . when an opponent's witness proves to be in fact biased in favor of the cross-examiner, the danger of leading questions arises and they may be forbidden." *Jones on Evidence,* §2336: "The trial court may, however, restrict the use of leading questions where the witness shows bias in favor of the cross-examiner." *Underhill's Criminal Evidence,* §389, pages 752-753, 757; *Best on Evidence,* §642, pages 593, 601; *American Law Institute, Model Code of Evi-*

dence, Edmund M. Morgan, Reporter, Rule 105(g), pages 108-110.

In this case the facts were ample to justify the prohibition against leading questions. Mrs. Cowart was a former employee of Dr. Mitchell (265). At Dr. Mitchell's request she had refused to give any statement to the government (425, 284, 764, 505). She had continued her refusal for a year until she had been advised her own prosecution was being considered (806-809). She had been unable to remember important parts of her testimony on direct examination without considerable refreshing (268, 274, 278, 280). Her husband had recently been operated on by Dr. Mitchell and had died between the first and second parts of her cross-examination (762, 827-828). The cross-examination of Mrs. Cowart discloses good reason for the limitation of leading questions. She gave an affirmative response to a question suggesting that she had delivered cash receipt books to Mrs. Mitchell at the end of February, whereas her true testimony placed the date at the end of January (770-771, 281), and gave an affirmative answer to a suggestion that she had been 15 months pregnant (798).

Objections to leading questions merely go to the form of the questioning. No injury can result in the quest for the truth. The question can always be reframed and asked again in unobjectionable form, as happened here (797, 766, 785, 813).

As the courts have stated many times, control of cross-examination is within the sound discretion of the trial court. *Remmer v. United States,* 205 F. (2d) 277, 290; *Glasser v. United States,* 315 U.S. 60, 83; *Thiede v. Utah Territory,* 159 U.S. 510, 519. In *St. Clair v. United States,* 154 U.S. 134, 150, a case involving the converse of the situation here, that is to say, permissive use of leading questions on direct examination, the court said:

> ". . . This was allowed, and we cannot say that the court in so ruling committed error. In such matters much must be left to the sound discretion of the trial judge who sees the witness, and can, therefore, determine in the interest of truth and justice whether the circumstances justify leading questions to be propounded to a witness by the party producing him. In Bastin v. Carew, Ryan & Mood. 127, Lord Chief Justice Abbott well said that 'in each particular case there must be some discretion in the presiding judge as to the mode in which the examination shall be conducted in order best to answer the purposes of justice.' . . . " (150)

The record fully supports the appropriateness of limiting the use of leading questions by the defense in its interrogation of Mrs. Cowart.

V.

ADMISSIBILITY OF EVIDENCE.

We call attention to the rule most recently set forth in *Remmer v. United States,* 205 F. (2d) 277, 289. Evidentiary contentions "must be considered in conjunction with the salutary rule that the discretion of the trial court should not be disturbed in such matters unless the accused has been deprived of substantial rights." *Federal Rules of Criminal Procedure 52 (a). United States v. Johnson,* 319 U.S. 503, 519-520.

In view of the overwhelming, clear and direct evidence of fraud in this case we urge that no evidentiary ruling, even if incorrect,—which we do not admit—could disturb the verdict.

A. Evidence relating to appellants' tax affairs in other years is admissible when relevant to any issue. Such evidence is relevant here with respect to (1) origin of the scheme to outsmart the government, (2) extent of good faith in paying up back taxes, and (3) the defense of accidental happenstance.

The principal evidentiary point relates to the admission in evidence of appellants' financial practices in other years.

Dr. Mitchell's previous acquittal on charges of tax evasion during 1942 to 1946 is, of course, conclusive on the issue of absence of a wilful attempt to evade taxes with respect to those years. However, the facts of his financial affairs in years previous to 1947 are directly pertinent to three issues in the instant case. Under the doctrine of multiple admissibility, admissi-

bility on any one ground makes such evidence relevant and admissible. *Wigmore on Evidence,* §215.

1. Insofar as the scheme for 1947 is concerned, the government charged, and there was abundant evidence to prove, that the scheme devised for use in 1947 was a direct outgrowth of the transparency of Dr. Mitchell's previous practices and had been designed to outsmart the government.

The evidence showed that on November 5, 1946, Agent Green notified Dr. Mitchell that by means of bank deposits he had discovered large discrepancies in Dr. Mitchell's tax returns for the years 1942 to 1945. Agent Green testified to his conversation with Dr. Mitchell in this connection as follows:

> "A. I told the doctor that I had just finished adding up the bank deposits for the years 1942 through 1945 and had compared them with the gross receipts as reflected on his tax returns for those years and had found a large discrepancy.
>
> Q. What did he say to that?
>
> A. He asked me if I had any idea of what the figure was, and I told him I could only give him a very preliminary estimate and the figure I quoted to him was $100,000.
>
> Q. And how did you tell him you had arrived at that figure?
>
> A. I told him I had arrived at it by totaling the bank deposits.
>
> Q. What was said by Dr. Mitchell to that?
>
> A. He asked—I don't remember whether it was just at that [227] very moment or a little

while later if he asked that—that he asked whether he should have an accountant.

Q. What did you say?

A. I told him that since the girls had mentioned and had told me that all money that was taken in by the profession was deposited and that all expenses of his practice were paid by check, that an accountant would not be necessary because they could get the figures right from the bank account and right from the checking account and that if there was any problem that they ran into I was available for him as we are in all cases.

Q. Did you say what figures could be used for gross income?

A. I told him that the bank deposits, since I had been informed all money was put in that account or accounts, would be the basis of his gross receipts." (260, 261, 262)

Within 30 to 60 days there began the use of two sets of cash receipt books and the secret removal of currency from the office. The government produced direct evidence that the purpose of this change was income tax evasion. Here is the testimony of Mrs. Peirson as to her conversation with Mrs. Cowart, office bookkeeper and coconspirator:

"A. She said that up to now the Doctor had always put all, banked all his money in the bank, and that when the Internal Revenue Department went there to look it was always there, and that this year he had intended to outsmart the Government, that he put so much in the bank but he would withhold so much for himself, too.

Q. Did Mrs. Cowart say who had been switching these books?

A. Yes. She told me she had been switching the books on me when I went on my relief up to that time.

Q. Did she say how long she had been doing this?

A. She said since I had started working until that time.

Q. Did she say who had instructed her to do this? [408]

A. Well, she always had told me that it was Doctor's idea, she was just cooperating and carrying through the plan.

Q. Did she tell you the purpose of making this switch?

A. Well, yes. He was only going to show so much on one set of books and on the other set of books he was going to keep the amount from them for himself and that would determine the two different sums of money.

Q. Well, did she say whether or not this was for tax purposes?

A. Yes. She said that he was doing it so that he would only show so much on his income tax." (419, 420)

See also Mrs. Peirson's testimony at pages 460-461, 487-488.

Under these circumstances the facts relating to understatement from 1938 to 1946 became directly material on the question of appellants' knowledge of bookkeeping and financial matters and as bearing on the question of the intent, motive, and purpose with which the dual cash receipt book system was set up.

Such evidence is admissible if relevant to any issue in the case. *Wigmore on Evidence,* §301, §305. The criminality of other acts is immaterial. *Wigmore on Evidence,* §216. This evidence was introduced to show that appellants set up their books and affairs in order to evade taxes and with the knowledge and directly based on the experience growing out of Dr. Mitchell's previous tax investigation. *Johnson v. United States,* 318 U.S. 189, 195-196; *Michelson v. United States,* 335 U.S. 469, 475-476; *McCoy v. United States,* 169 F. (2d) 776, 783 (9 Cir.); *Weiss v. United States,* 122 F. (2d) 675, 681-685; *Bracey v. United States,* 142 F. (2d) 85, 87-88; *Emmich v. United States,* 298 Fed. 5, 9; *Malone v. United States,* 94 F. (2d) 281, 286-287; *Himmelfarb v. United States,* 175 F. (2d) 924.

2. Additionally, however, the defense itself interjected into the trial evidence relating to earlier years.

In the opening statement for the defense, the prior acquittal of Dr. Mitchell was stressed at length (81, 82, 84, 87, 101), and a theory was elaborated that Dr. Mitchell had not conspired to evade his taxes but that the government had conspired to "get" Dr. Mitchell (82, 106).

The defense's opening statement also stressed the deposit of $185,000 by Dr. Mitchell (99, 102), and at the outset of the trial introduced Exhibit B, designed to show that Dr. Mitchell had overpaid his taxes for the years 1942 to 1946 when he had learned of deficiencies for those years, and that he still had a substantial overpayment of $28,000 for the years 1942 to

1946 on deposit with the government which would more than cover any deficiencies proved for 1947. Exhibit B was introduced on cross-examination of the first important government witness (249, 250). This theory of overpayment by $28,000 was developed through the testimony of Mr. Lukes, appellants' tax accountant (1307-1309). This same theory was a main argument of the defense in its closing address to the jury (1896-1897).

To rebut this evidence of good faith by payment, the government was entitled to show that Dr. Mitchell only filed amended returns for 1942 to 1946, years in which criminal prosecution was still possible and on which the criminal statute of limitations had not yet run; that while the tax investigation and Dr. Mitchell's power of attorney included the years 1938 to 1946 (ex. 61, 1668-1670), in each of which he had either filed no tax return or a return grossly understating his true income (386-389), that in years prior to 1942 he had filed no amended returns and paid nothing on his taxes (1202, 1671). This evidence then, and particularly that relating to 1938 to 1941, was introduced on issues raised by the defense, that is to say, good faith by full payment of all taxes owed upon discovery of inadequate bookkeeping.

3. Finally, the evidence was admissible on the issue of Dr. Mitchell's credibility as a witness. Dr. Mitchell's basic defense was that the tax returns for 1947 understated his true professional income as an unhappy result of a collocation of circumstances, a

series of misadventures and mishaps which made possible the systematic concealment and removal of currency from his office without any knowledge on his part of the entire affair until September, 1949. The main issue presented by Dr. Mitchell's defense and by his own testimony was Dr. Mitchell's complete ignorance and entire good faith on the one hand as opposed to his deliberate participation in a scheme to outsmart the government on the other. On this issue, that is to say, Dr. Mitchell's credibility as to whether or not he was the victim of circumstance, evidence relating to his financial practices in previous years was likewise admissible.

Such prior conduct, not amounting to wilful attempt to evade in prior years, is nevertheless admissible evidence bearing on the credibility of Dr. Mitchell's story and the possibility that he was a victim of accidental circumstances.

As stated by Professor Wigmore, if other acts are relevant, their criminality is immaterial. *Wigmore on Evidence,* §216. *McCoy v. United States,* 169 F. (2d) 776, 783 (9 Cir.); *Bracey v. United States,* 142 F. (2d) 85, 87-88. (D.C. 1944) (Previous sexual offenses against little girls); *Michelson v. United States,* 335 U.S. 469, 475-476; *Fall v. United States,* 49 F. (2d) 506; *Weiss v. United States,* 122 F. (2d) 675, 681-685; *Johnson v. United States,* 318 U.S. 189, 195-196. Dr. Mitchell's prior acquittal on a charge of wilful attempt to evade taxes for 1942 to 1946 does not make relevant evidence relating to

those years any the less admissible in this proceeding. *People v. Johnston,* 20 A.L.R. 2nd, 1001, annotation at 1035; 22 C.J.S., Criminal Law, §691; *Himmelfarb v. United States,* 175 F. (2d) 924, 941.

The same facts may be relevant to more than one legal proceeding. *United States v. Bayer,* 331, U.S. 532, (two prosecutions for different offenses even though arising out of the same facts); *Pinkerton v. United States,* 328 U.S. 640, (prosecution for conspiracy as well as the substantive offenses); *Coy v. United States,* 5 F. (2d) 309 (9 Cir.); *Feldman v. United States,* 322 U.S. 487, 490-493, (state and federal prosecutions); *Helvering v. Mitchell,* 303 U.S. 391, (government may proceed in civil fraud liability even though defendant acquitted of criminal fraud); *Fall v. United States,* 49 F. (2d) 506, 511, (after Fall and Doheney were acquitted of conspiracy, Fall was convicted of bribery).

The evidence then relating to 1938 to 1946 is admissible on three separate grounds of relevancy, any one of which is sufficient by itself.

B. Appellants were not entitled to inspect prior statements of government witnesses, because no contradiction with their current testimony was ever shown.

The court sustained the refusal of the government to produce prior statements of its witnesses who testified in court. These witnesses, Mrs. Cowart and Mrs. Peirson, were examined fully by the defense as to all relevant facts within their knowledge. The

government was not required to produce previous statements taken from them.

This ruling was correct. Such statements are not evidence, but are part of the work product of the lawyer. Consistently in federal evidence such statements of witnesses have not been required to be produced. *Hickman v. Taylor,* 329 U.S. 495, 512. This ruling is so clear that counsel familiar with it no longer subpoena narrative statements of witnesses. *Bowman Dairy v. United States,* 341 U.S. 214, 217, 219, 221.

Prior statements need not be produced because they are not evidence. There is, however, one situation in which said statements may become *evidence,* that is to say, when the prior statement is shown to be inconsistent in material respects with the testimony of the witness on the stand. After such a showing the statement becomes a prior inconsistent statement and becomes possible evidentiary matter for the purpose of impeaching the veracity of the witness. After the making of such a showing, then and only then, can a party demand statements in the possession of the government which are contradictory to the witness's present testimony. After such a showing, such statements have graduated from hearsay to evidence. This rule is most recently set forth in *Gordon v. United States,* 344 U.S. 414. There the witness's direct testimony implicated petitioner in the crime, but the witness admitted that on three or four earlier occasions he had made statements clearing petitioner. The

court held that after such a showing petitioner was entitled to demand the statements and use them to impeach the witness's credibility. Because the foundation had been laid, then and only then, did the prior statements graduate from hearsay to evidence and their production become required. As stated by the court:

> "By proper cross-examination, defense counsel laid a foundation for his demand by showing that the documents were in existence, were in possession of the Government, were made by the Government's witness under examination, *were contradictory of his present testimony, and that the contradiction was as to relevant, important and material matters* which directly bore on the main issue being tried: the participation of the accused in the crime. The demand was for production of these specific documents and did not propose any broad or blind fishing expedition among documents possessed by the Government on the chance that something impeaching might turn up. . . ." (418)

> ". . . Traditional rules of admissibility prevent opening the door to documents which merely differ on immaterial matters. The alleged contradictions to this witness' testimony relate not to collateral matters but to the very incrimination of petitioners. . . ." (421) (Italics ours)

The rule is clear. First, a showing of *contradictory* statements on material matters, then and only then, the production of matter which on the basis of that showing has become evidentiary.

In the absence of such a showing, production of the statements will not be required. *Goldman v. United States,* 316 U.S. 129, 132. *United States v. Krulewitch,* 145 F. (2d) 76, 156 A.L.R. 337, 345.

This court most recently applied the rule in *D'Aquino v. United States,* 192 F. (2d) 338, 375, and in denying production said:

> "We think that the correct ruling is that recited in Goldman v. United States, 316 U.S. 129, 132, 62 S. Ct. 993, 995, 86 L. Ed. 1322, to the effect that it is 'the better rule that where a witness does not use his notes or memoranda in court, a party has no absolute right to have them produced and to inspect them.' That case also held that under the circumstances here existing, whether the Government's files be produced should in general be a matter for the determination of the trial judge.
>
> "It is apparent that what was sought here was but a part of the work papers used by the prosecutor in preparing the case. There was a complete lack of showing that the papers in question were relevant for the purpose of impeachment. Cf. Arnstein v. United States, 54 App. D.C. 199, 296 F. 946. We think it cannot be said that in refusing to require production of this paper the court abused its discretion." (375)

See also *United States v. Walker,* 190 F. (2d) 481, 483, (2nd Cir.); *United States v. DeNormand,* 149 F. (2d) 622, 625; *United States v. Dilliard,* 101 F. (2d) 829, 837 (2nd Cir.); *United States v. Muraskin,* 99 F. (2d) 815, 816; *United States v. Rosenfeld,* 57 F. (2d)

74, 76; *Arnstein v. United States,* 296 Fed. 946, 950. This claim for production of prior statements of witnesses is not novel, but appears in practically every case in which witnesses have appeared before a Grand Jury. The rulings are similar—in the absence of a showing of prior material contradiction, production will be denied. *United States v. Cohen,* 145 F. (2d) 82, 92.

We have then a consistent body of law and practice supporting the non-production of such prior statements. The reason for the rule is clear. Since the witness himself has testified, his prior statements are hearsay and purely collateral. In the ordinary case their use could only promote confusion of issues; that is to say, the transfer of the issue from the facts as they happened to the issue of what the witness has said about the facts. Courts will depart from the highway of direct testimony to enter such thorny thickets only when a showing is made of evidentiary facts to be harvested. The rule, of course, works both ways. The government is not entitled to root around among defense counsel's work papers for prior statements of *its* witnesses on the chance that something inconsistent may turn up.

In this case no showing whatsoever of prior material contradictions had been made. Appellants were not entitled to the production of the statements sought.

Complaint is made of the failure to make available for inspection Mr. Whiteside's confidential report.

Careful reading of the transcript indicates that while such report was produced in court, it was not used by the witness in giving any of his testimony nor was it referred to by him as a basis for any of his testimony (612, 614). Under the circumstances it did not become evidence. *D'Aquino v. United States,* 192 F. (2d) 338, 375.

Nor did this witness use any record or notes of what had been said to him by Dr. Mitchell on prior occasions. Since the records and notes were not used there was no requirement that they be produced. The situation is on all fours with that of the notes and recordings in *Goldman v. United States,* 316 U.S. 129, 131-132.

C. Impeachment of Dr. Mitchell by reference to his prior statements followed an appropriate procedure.

Complaint is made that a statement was shown to Dr. Mitchell during his cross-examination without at the same time being shown to his counsel.

On cross-examination, Dr. Mitchell was asked whether he had on a prior occasion given certain testimony under oath to the Bureau of Internal Revenue in November, 1950 (1686). A record of the specific question and answer about which he was being interrogated was shown to him on the stand but not to his counsel, who then objected.

The purpose of the questioning was to show a prior inconsistent statement for impeachment purposes. Dr. Mitchell, of course, was present at the giving of his

own statement in 1950 as was his counsel, Mr. Theodore Roche, Jr. (1729). Such statement was thus no secret to Dr. Mitchell or his attorneys except insofar as details of a previous narrative at variance with his present testimony may have escaped their recollection.

The subject matter of this specific cross-examination was as follows: On direct examination Dr. Mitchell testified that he had discussed with Mrs. Cowart in January, 1947, the subject of giving money to Mrs. Mitchell (1632-1633). On cross-examination he admitted he had testified in 1950 that he had never discussed any diversion of funds with Mrs. Cowart (1688, 1689). This, of course, was inconsistent with his direct testimony. On redirect examination, Dr. Mitchell testified that he had first recalled this discussion with Mrs. Cowart some time in 1952 when in the course of going over his checkbooks it suddenly flashed upon him (1735). No further reference was made on redirect examination to his 1950 statement, nor was request made to examine and use the statement at that time.

The substance of the transaction, then, is that Dr. Mitchell testified about a conversation he had had with Mrs. Cowart; that he had previously testified there were no such conversations; that the explanation of his previous testimony was that he had forgotten about this conversation until quite recently. We thus have a completed explanation by Dr. Mitchell as to his prior testimony. No possible in-

jury resulted to him from the procedure followed in bringing out this sequence of events.

The usual method of impeaching a hostile witness by prior testimony is to show a record of his testimony to the witness, and ask if he made such a statement. The document itself is merely a prod to recollection. If it prods or refreshes the witness's recollection we then have affirmative testimony from the witness as to what he said on a prior occasion and the document is never used as evidence. Since the witness is admittedly hostile no danger of improper suggestion can result. Such a document is frequently used to impeach or refresh a witness on several different subjects during the course of the interrogation. An instance of such multiple use occurred here (1688, 1715). For that reason counsel is generally permitted to control the use of the document until the cross-examination is concluded.

On redirect examination the document becomes fully available for study and use by opposing counsel. The defense used this procedure at this trial in connection with the testimony of Mrs. Cowart. At the conclusion of her testimony, defense counsel asked to inspect and was given the grand jury transcript used during her direct interrogation (284) and made later use of the transcript himself (832).

This is an appropriate procedure. *United States v. Socony-Vacuum Oil Company,* 310 U.S. 150, 231-237. There the Supreme Court held it was proper under the circumstances for the government to use grand

jury transcripts to refresh the recollection of hostile witnesses without showing the transcripts or the portions used, either to the defendants, the witnesses, or their counsel. The court held that procedures in these matters are not subject to ironclad rules but are matters resting in the discretion of the court. See also *United States v. Dilliard,* 101 F. (2d) 829, 837, (2 Cir.); *United States v. M. Kraus & Bros.,* 149 F. (2d) 773, 775-776; *Phillips v. United States,* 148 F. (2d) 714, 717; *Wigmore on Evidence,* §§755, 765.

There are, of course, other practices which could be followed. Professor Wigmore forcefully argues against any requirement of showing the record of the prior statement, even to the witness. *Wigmore on Evidence,* §§1259, 1260, 1261, 1263. Professor Wigmore claims that the practice abolishes a most effective mode of discrediting a witness on cross-examination and should be abandoned, as it has been in England for many years. *Wigmore on Evidence,* §1260, p. 502, §1263, p. 518.

Professor Wigmore indicates that where the document is shown to the witness, opposing counsel is entitled to inspect the document *before the witness leaves the stand.* This is in harmony with the practice fixing the appropriate time for inspection and use of the document during rehabilitation of the witness on redirect examination. *Wigmore on Evidence,* §§1261, 1896.

The procedure followed was an acceptable procedure. No possible prejudice resulted to appellants.

United States v. Socony-Vacuum Oil Company, 310 U.S. 150, 231-237; *United States v. M. Kraus & Bros.,* 149 F. (2d) 773, 775.

D. The court properly refused to admit evidence relating to the years 1949 and 1950 under an indictment charging tax fraud for the year 1947.

Exception is taken to the refusal of the trial court to permit appellants to introduce figures relating to their financial affairs during 1949 and 1950. These were years following the discovery of the scheme and could have no bearing on the presence or absence of criminal intent during 1947. The uncovering of the particular fraud in this case took place in August, 1949. Subsequent events were remote and collateral.

The court permitted the defense full latitude in developing accounting testimony over a period of two weeks, with exhibits produced by the suitcase load. Mr. Lukes gave his analysis of figures for 1945, 1946, 1947, and 1948 (1147-1149). To entertain further financial analysis two and three years subsequent to the indictment year would bring a whole new field of evidence and prolong the trial on an essentially uncontested issue, viz., that there had been a substantial amount of unreported income in 1947. The evidence was properly excluded as remote and collateral.

In *United States v. Socony-Vacuum Oil Company,* 310 U.S. 150, 228-231, the Supreme Court sustained the action of the district court in refusing to receive evidence relating to matters subsequent to the indict-

ment. See also *Pittsburgh Glass Co. v. Board,* 313 U.S. 146, 157-163; *Grell v. United States,* 112 F. (2d) 861, 874-876; *United States v. Stoehr,* 196 F. (2d) 276, 281-283; *Steinberg v. United States,* 162 F. (2d) 120, 125; *United States v. Lustig,* 163 F. (2d) 85, 90.

CONCLUSION.

After a trial of one month appellants were convicted of four counts of income tax evasion and one count of conspiracy. The proof showed a carefully designed scheme of tax fraud which included four of the five badges of fraud set forth in the *Spies* case, any one of which may be sufficient by itself to prove the crime of wilful attempt to evade income taxes.

The principal issue at the trial involved the presence or absence of criminal intent of appellants, the defense being, in the case of Dr. Mitchell that he had no knowledge of the scheme, and in the case of Mrs. Mitchell that she had only matrimonial security in mind. This defense was in the teeth of the evidence of Mrs. Peirson and Mrs. Cowart.

The jury found there had been a fraudulent tax scheme. The evidence supported the verdict. The instructions were appropriate to the main issue—that is to say, criminal scheme versus complete ignorance. The evidentiary and procedural points are either not well taken, or are matters of trial discretion which may be appropriately handled in more than one

manner, or are matters of such minute importance in the course of the trial as a whole as to have not the slightest effect on the result. As was said in *Glasser v. United States,* 315 U.S. 60, 83, the court should be careful to avoid the magnification on appeal of instances which were of little importance in their setting. *Federal Rules of Criminal Procedure* 52(a); *Zamloch v. United States,* 193 F. (2d) 889, 894.

The judgment in this case of flagrant fraud abundantly proved must be affirmed.

Dated, San Francisco, California,
January 13, 1954.

LLOYD H. BURKE,
United States Attorney,
MACKLIN FLEMING,
Special Assistant to the United States Attorney,
Attorneys for Appellee.

(Appendix Follows.)

Appendix

"Voir Dire Examination of Prospective Jurors

ABRAM H. HERSHLER,

a prospective juror, was duly sworn and examined on voir dire, as follows:

The Court: Your occupation, Mr. Hershler?

A. I am an executive with a corporation.

Q. What is the name of the corporation?

A. Bancroft Whitney Company.

Q. You are not a lawyer?

A. No, I am not.

Q. Do you have anything to do with the sale of law books over there?

A. I personally, do you mean, or the company?

Q. You personally. I know the Bancroft Whitney Company sells law books.

A. That's right. Well, I personally don't have any direct connection with the sales. Beyond that we do plan the publications that we are going [2*] to sell.

Q. Well, have you had any legal training?

A. No, not training.

Q. Well, has your experience with the company given you any familiarity with it?

A. I am afraid to answer. It has to a very limited degree.

Q. Are you acquainted with Mr. Dana, the gentleman here in the blue suit?

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*Page numbering appearing at top of page of original Reporter's Transcript of Record.

A. No. I have seen him, but I don't know him.

Q. You get around the court very much in your work? A. I have in the past.

Q. And in what way, as a salesman?

A. No. I had charge of the public relations for a while and I had contacts both with the Supreme and Appellate Courts and in Los Angeles with the Federal Courts.

Q. Do you know Dr. Mitchell?

A. No, I don't.

Q. Or his wife? A. No.

Q. Nor, I assume, you know none of these gentlemen here at counsel table?

A. I don't think so.

Q. Have you ever had any difficulty with the Bureau of Internal Revenue, Mr. Hershler?

A. Well, about 25 years ago there was some question as to my having made a return because of my residence in a foreign [3] country. But that was settled.

Q. And in a friendly fashion, I take it?

A. Very friendly.

Q. Did you come away from that experience with any feeling of animosity towards the Bureau or any of its agents? A. No.

Q. It has been developed here, as you observe, that Dr. Mitchell is a practicing physician and surgeon here. Do you feel that if you were selected as a juror you would treat him any differently because of that? A. No.

Q. I take it that you believe with the rest of us that the Government has a right to see to it that the laws with respect to income tax evasion are strictly complied with? A. Yes.

Q. You have no quarrel with that principle?

A. No.

Q. Do you feel that if you were selected to serve here you could do so, independently exercising your own good judgment and consult with your fellow jurors when the time comes for your deliberations and arrive at a verdict that in your judgment would be a proper one to all sides?

A. I think so. There is one qualification. I read the reports of the first trial in the newspapers. I read them practically every day. So I am a little more familiar with [4] this case than——

Q. Pardon me. Did the reading of those newspaper accounts cause you to form an opinion as to the guilt or innocence of these defendants?

A. Well, I suppose I had an opinion as I read them, yes.

Q. Well, is that opinion one which you entertain now? I mean, do you have a present opinion as to the guilt or innocence of these people?

A. Well, I would say presently I don't have any opinion. I don't suppose. I don't know unconsciously whether I may have or not. I don't know.

Q. But, in other words, you are going to listen to the evidence, if you are selected here, and make up your mind when all the evidence is in and you

have heard the arguments of counsel and the instructions of the Court; is that correct?

A. Correct.

The Court: All right.

Mr. Fleming: I have no questions.

Mr. Dana: I have one inquiry of the juror, if he would be willing to have him try his own case if he were in Dr. Mitchell's position.

The Court: Yes, I will ask that question.

Q. If you, Mr. Hershler, found yourself in the unfortunate position now occupied by Dr. Mitchell and his wife, would you be willing to have your case determined and passed upon [5] by a jury composed of 12 people whose frame of mind is the same as that of yours at the present time?

A. Do you say "willing" or "prefer"? Would there be any difference in your question?

Q. No, I don't think so. The choice of words is not important. Would you be willing—I will put it that way—to have your case tried by 12 people in your frame of mind?

A. I would be willing, but I wouldn't prefer it.

Mr. Dana: Would the Court ask if he would prefer not to have?

The Court: Would you prefer not to?

A. I would prefer not to. I would prefer to have it tried by the judge.

The Court: All right.

Mr. Fleming: No further questions.

Mr. Dana: No further questions.

Mr. Fleming: The Government will pass.

Mr. Dana: We will excuse Mrs. Casey.

The Clerk: You have exhausted your challenges.

Mr. Fleming: The Government will pass.

Mr. Dana: May we have a conference then for a few minutes? I am not quite sure that I follow——

The Court: You have exercised all your challenges.

Mr. Dana: Well, then, I will at this time exercise what I believe would be a challenge for cause as to [6] Juror—as to Juror No. 2 (Mr. Hershler) because of the statement he prefers not to have his case tried by 12 people in his frame of mind.

The Court: Denied. I think we have a frank appraisal of his views. I don't think there is any question of cause involved here.

Mr. Dana: Well, if that be the ruling of the Court, it will have to be such.

The Court: All right. Swear the jury.

(Thereupon the jurors were sworn to try the cause; and thereupon two alternates were chosen, and duly sworn as alternates.)

* * *." (Pages 56-60)

"* * * * * * *

The Court: The jurors remaining in the body of the courtroom may be excused when I conclude my instructions to this jury.

Now, as I have repeatedly indicated to you, ladies and gentlemen, we start the trial of this case this afternoon at 2 o'clock. We are starting, if I may use

the expression, from scratch, so that you are not to read anything in the newspapers concerning this case, you are completely to disregard any impression that may have been created in your mind concerning it, and you are to remember that you are to try the case wholly upon the evidence which is received in this courtroom; and I further instruct you and admonish you and caution you to refrain from reading anything further [10] about the case in the newspapers. Now, that admonition I give you in all seriousness and I think you should regard it. Of course if you do read anything in the newspapers about it, I have no control over that, I won't know it. And I would also ask you to refrain from listening to any radio broadcasts which may appear on the various news hours, news items, for the same basis that I have indicated to you above.

We will start the trial of the case this afternoon at 2 o'clock, and then we will go on tomorrow morning again.

You are now discharged with the admonition that you are not to discuss the case—I am required to give you this instruction—either among yourselves or with others, and that you are not to form or express any opinion about it until it is finally submitted to you.

We will now adjourn until 2 o'clock.

* * * ." (Pages 63-64)